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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOWARD WEBBER,

Defendant.

No. 13-662 RS

DEFENDANT WEBBER'S MOTION FOR REVOCATION OF MAGISTRATE JUDGE'S DETENTION ORDER

Date: September 27, 2016
Time: 2:30 p.m.
Court: Honorable Richard Seeborg

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TO: UNITED STATES OF AMERICA, PLAINTIFF; AND BRIAN STRETCH, ACTING UNITED STATES ATTORNEY, NORTHERN DISTRICT OF CALIFORNIA; AND CYNTHIA STIER, ASSISTANT UNITED STATES ATTORNEY, AND GREGORY BERNSTEIN, US DEPARTMENT OF JUSTICE ATTORNEY:

PLEASE TAKE NOTICE that on September 27, 2016, at 2:00 p.m., or as soon thereafter as the matter may be heard, defendant Howard Webber will move this Court for an order revoking the order of detention issued by Magistrate Judge Corley on September 1, 2016

The motion is based on this notice and motion, the following Memorandum of Points and Authorities, 18 U.S.C. § 3142, 18 U.S.C. § 3145 and all other applicable constitutional, statutory and case authority,

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendant Howard Webber, by and through counsel, hereby files a motion seeking revocation of Magistrate Judge Corley's most recent detention order. *See* Docket # 151, Minute Order reflecting detention order. Although Mr. Webber has not performed perfectly while on earlier terms of pretrial release, by the time of the motion hearing Mr. Webber will have served the equivalent of a 30 month sentence with the BOP on this case, factoring in the 15% statutory good time to which he is entitled. Given the non-violent nature of the instant offense, as well as the small amount of loss in this case that Mr. Webber is alleged to have caused, he has more than served the time he should serve on this case even in the event he is convicted at trial. At some point, continued pretrial incarceration in the face of the presumption of innocence becomes unduly prejudicial and violative of the due process our Constitution affords. That day has now arrived, and this Court should release Mr. Webber forthwith to allow him adequate time to meet with his counsel in a non-custodial setting to prepare for trial.

Review of a magistrate's detention order is *de novo* and is to be determined "promptly." *See* 18 U.S.C. §3145(b). Accordingly, this Court must start from scratch with the Bail Reform Act and hold the government to its heavy burden to establish that ongoing pretrial detention for Mr. Webber is appropriate. Because this case is not a presumption case, 18 U.S.C. § 3142 affords Mr. Webber a default position that he should be released pending trial. Throughout the course of these proceedings, the government has never succeeded in showing that Mr. Webber is either a serious risk of flight, nor a danger to the community. Because there are no reasonable grounds to require his pretrial detention, Mr. Webber respectfully requests that the Court revoke the September 1, 2016 detention order and order him immediately released on bond.

FACTUAL BACKGROUND

I. THE SUPERCEDING INDICTMENT AND EVIDENCE PRODUCED IN DISCOVERY

A. Mr. Webber's Alleged Role in the Conspiracy to Commit Mail and Wire Fraud is Minor Compared to his Out-of-Custody Co-Defendant, Bercovich

As this Court is aware, the instant case charges a tax fraud scheme in which Mr. Bercovich is accused of conspiring with Mr. Webber to prepare and file false tax returns for individuals claiming income in an amount that entitled the filer to an Earned Income Tax Credit along with the Making Work Pay credit. As charged in the Indictment, the government claims that Mr. Webber's role in the alleged conspiracy (who, while at all times relevant to the Superceding Indictment was incarcerated in Marin County, California or Milwaukee, Wisconsin) is as follows:

1. That Mr. Webber allegedly "engaged in discussions" with Bercovich preparing federal income tax returns for prison inmates that claimed tax refunds based upon the Earned Income Tax Credit along with the Making Work Pay credit. *See* Superceding Indictment, Docket 153, at ¶10;
2. That Mr. Webber allegedly used an information sheet created by Bercovich to both solicit personal identifying information from inmates, and recruit other inmates to do so. *See id.*;
3. That Mr. Webber transcribed the information onto the information sheets that Bercovich created, and either transmitted the sheets to Bercovich or asked another inmate to do so. (*id.* at ¶ 11);

4. That Mr. Webber split the IARLS dee of $250 or 25% of the fraudulent refund for each false tax return filed with the IRS.

Essentially, the government's case boils down to a claim that Mr. Webber advertised two perfectly legitimate federal tax credits to inmates while he was incarcerated, and encouraged them to report wages in a quantity of $7,000 across the board, regardless of whether or not inmates actually earned that quantity of wages. To facilitate the filings of returns, Mr. Webber then allegedly provided inmates with information sheets in which the inmates offered all the personal information necessary to prepare a tax return. These forms were then mailed off to Mr. Bercovich in California, after which Mr. Webber's role in any alleged wrongdoing necessarily ceased. Given his custodial status and complete inability to do anything further with respect to the tax returns, Mr. Webber's role in the alleged conspiracy could not possibly be any greater than this. He did not play any role in filing or preparing tax returns. Nor did he receive any refunds checks. Nor did Mr. Webber receive any money directly from the IRS, nor play *any* role in controlling *any* bank accounts at issue with IARLS or any of Bercovich's other bank accounts. To the extent any actual fraud occurred in connection with the IRS, either through false tax refund claims or mishandling of refund checks, the fraud at issue in this case belongs to Mr. Bercovich, rather than Mr. Webber.

B. Mr. Webber Received A Tiny Amount of Money as a Result of IARLS When Compared to Co-Defendant Bercovich

To the extent inmates received or did not receive money from the scheme, the decision to deposit, withdraw, and disburse money was entirely within the power of Bercovich alone. Other than (1) a few thousand dollars that Mr. Bercovich paid to Mr. Webber's attorney in Wisconsin; (2) $3,000 Mr. Bercovich transmitted directly to Mr. Webber while in custody, and (3) a few hundred dollars' worth of checks in odds-and-ends amounts paid by Mr. Bercovich to Mr. Webber prior to his arrival at MSDF, the government will not be able to offer any reasonable argument trial that Mr. Webber profited in any significant way from the alleged fraud.[1]

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[1] To this end, the government recently produced hundreds of pages of discovery which contain additional bank records of Bercovich. Counsel for Mr. Webber is endeavoring to

Moreover, even presuming that the government's allegations as to Mr. Webber's intent and purpose in connection with this alleged fraud are correct (which both the Bail Reform Act and the presumption of innocence forbid this Court to do) Mr. Webber's alleged role in this alleged conspiracy is very small. Although all the charged counts of mail fraud and aggravated identity theft contained in the Superceding Indictment all stem from inmate tax returns originating from MSDF, it is Mr. Webber's belief that at trial, the government intends to introduce evidence of a much larger-scale fraud, most of which resulted from the conduct of Bercovich alone. *See* Exhibit A (filed under seal)(government spreadsheet of claimed loss). Of the 623 returns alleged as fraudulent that were filed with a return address of Box 603 in Kentfield, CA, only **34** appear to originate with inmates' information from the Wisconsin prison where Mr. Webber was housed at all times relevant to Counts 2-28 of the Superceding Indictment. See *id*.[2] Although it is possible that a small number of additional returns originated from the Santa Clara County facility where Mr. Webber was housed between July 7, 2011 and September, 2011 (prior to his transfer to MSDF) the number of returns that the government can potentially connect to Mr. Webber pales in comparison to the scope of its allegations of fraud against Bercovich.

In terms of dollar figures, the differentiation between these two defendants is striking. Of the 34 returns that Mr. Webber has identified as "Wisconsin inmate" returns, only $24,987 in refunds were claimed. This is in significant contrast to the total of all refunds claimed as

complete the analysis of those records prior to the September 27, 2016 detention review hearing to provide the Court a comprehensive picture of any and all money that actually flowed to Mr. Webber as a result of the claimed conspiracy. Due to the timing of the production, Mr. Webber was not able to present this information in his Opening Motion, but time constraints, set forth *infra*, required that the motion be filed prior to September 27.

[2] Exhibit A was provided to Mr. Webber for settlement purposes, and is the most comprehensive document the government has produced to date that reflects the scope of the alleged fraud that the government will claim at trial. In this document, the IRS agent assigned to this case color coded the applicable categories of returns. It is Mr. Webber's understanding that the orange section of Exhibit A, or 20 returns, reflect the returns claimed by the "Wisconsin inmates." However, further review of the discovery has revealed to Mr. Webber an additional 14 returns scattered throughout the spreadsheet that also appear related to the Wisconsin prison system, for a grand total of 34 out of 623 tax returns.

depicted in Exhibit A, which is $497,811. The vast majority of this case is thus based on conduct Bercovich engaged in alone and necessarily alone, given that Mr. Webber was in custody and could not have solicited participants to IARLS outside of the custodial system in the same manner as defendant Bercovich did. By all accounts, it was Bercovich, and not Mr. Webber, who expanded the scope of IARLS and the tax credit-claiming business

Typically, individuals are not held in custody for frauds committed in quantities of $24,987 – much less held for the nearly 30 months of time that Mr. Webber has spent in custody awaiting trial in this case. As will be set forth in more detail below, Mr. Webber now moves for pretrial release because he has done far more custodial time on this case already than the worst of the facts against him suggest he should have done. He additionally moves for release because there is no adequate evidence that he is either 1) a flight risk, nor 2) a danger to the community. Because the Bail Reform Act presumes release, and Mr. Webber is extremely close

II. PROCEDURAL HISTORY OF MR. WEBBER'S DETENTION AND BAIL

A. Mr. Webber Has Already Served the Equivalent of a 33 Month Custodial Term on This Case

Mr. Webber was initially brought into federal custody on October 8, 2013, when he was transferred from Stanley Correctional Institution in Wisconsin to the District of Minnesota after serving time in Wisconsin on a revocation sentence for a minor drug case imposed in 1998. For 13 years, the warrant on this revocation sentence was entered as "non-extraditable," despite repeated requests by Mr. Webber to the State of Wisconsin to resolve the issue. On July 20, 2011, Mr. Webber was arrested in Gilroy for a traffic ticket and continuously incarcerated while attempting to resolve the Wisconsin issue. During his Wisconsin sentence, the federal indictment was returned.

Since his out-of-district arraignment in federal court in Minnesota, Mr. Webber will have accumulated (by September 29, 2016, two days after the bail review hearing) a total of 26 months and 4 days in federal custody, which is the equivalent of a 30 month BOP custodial sentence assuming the statutory good time credits that Mr. Webber is entitled to by law.[3] This does not count any halfway house transitional release time, which Mr. Webber would ordinarily be entitled to at a rate of 10% of the total custodial term imposed. Were the traditional halfway house transitional release considered, then Mr. Webber has already done, by the day of the hearing, the equivalent of a 33 month custodial sentence.

The calculation of the time Mr. Webber has served may be summarized as follows:

- October 8, 2013 through January 22, 2015 (15 months, 14 days)
- April 2, 2015 through April 16, 2015(15 days)
- November 24, 2015 through September 29, 2016 (10 months, 5 days).

B. Mr. Webber's Detention, Release, and Performance on Supervision

At the outset of this case, Mr. Webber waived his right to a detention hearing due to his understanding that he would be required to report to Wisconsin on parole should he be released, and his lack of resources to sustain a release in Wisconsin. As Mr. Webber understood it, parole in Wisconsin was scheduled to terminate one year from the date of his Wisconsin release, on October 7, 2014, and he wanted his parole time to run out prior to seeking release on the federal case. *See* Docket 100 ("Detention Order") at 1:21-22.

Once October, 7, 2014 came and went, and Mr. Webber was released from all potential parole obligations to Wisconsin, Mr. Webber and counsel undertook a search for sureties and an appropriate release residence for Mr. Webber. That process took some time, and ultimately resulted in Mr. Webber's release to a halfway house upon the posting of a bond in the amount of $23,872. This money derived from Mr. Webber's inheritance from his mother's estate, Patricia Webber, after the siblings resolved the accounting and made the remainder of Mr. Webber's

[3] As Mr. Webber has demonstrated good conduct while in Glenn Dyer Jail in Oakland, and has never sustained so much as a write up, much less a disciplinary infraction, there is no reason to believe the BOP would not fully credit his good time.

share of the estate available. This release plan lasted for two months, after which Mr. Webber was terminated from the halfway house for purportedly yelling at staff and throwing juice and utensils (facts Mr. Webber has repeatedly denied in court.) Following termination, Judge Maria-Elena James (in Judge Corley's absence) released Mr. Webber on electronic monitoring and lockdown to the residence of Mayra Parl, Mr. Webber's ex-friend and mother to his teenage daughter, Maryanne.

The government subsequently moved for Mr. Webber's permanent remand. *See* Docket 98 and 98-1, Motion to Revoke Bond of Howard Webber. In support of its motion, the government submitted the declaration of IRS Agent Mark Twitchell, who contacted an individual named Josh Fisher than Mr. Webber used to work with and attached various emails containing financial projects Mr. Webber purported to be working on while in residence at the halfway house. *See* Docket 98-1. These emails, which amount to legal rambling and not much else, show that Mr. Webber was attempting to act as a middleman between Sterling Pacific, a financing company, and real estate purchasers. Although the government argued that these rambling emails rendered Mr. Webber an "economic danger", Judge Corley disagreed. *See* Docket 100. In her well-reasoned, April 3, 2015 order, Judge Corley indicated that "while the Court has concerns about the 'economic danger' posed by Mr. Webber's recent conduct involving the Mount Madonna Inn, that concern is not the basis for the Court's remand order." *Id.* at 3:8-9. Instead, the Court opted to remand Mr. Webber temporarily, in order to ensure that Ms. Parl was willing to act as a surety for Mr. Webber and also allow him to live with her. Id. at 3:1-7. Most importantly, in concluding the Order, the court noted that "it has not found, nor should its order by construed as a finding, that Mr. Webber violated the conditions of his release." *Id.* at 3:14-15. A hearing on April 16, 2015 followed.

At the April 16, 2015 hearing, the Court ordered Mr. Webber released to Ms. Parl's residence on electronic monitoring and curfew conditions. *See* Docket 123, Detention Order No. 2, at 2:7-8. 5 additional detention review hearings were held over the next few months, whereby Mr. Webber's residence changed and his curfew restriction was relaxed. Things appeared to be going relatively well until November 10, 2015, when Mr. Webber violated his curfew condition by failing to return home by 10:00 p.m. and did not return home until 4:10 a.m. *See* Pretrial Services Petition for Arrest Warrant, Docket 120 (sealed). For this and other reasons, including 1) Mr. Webber's alleged use of a "smart phone" without Pretrial Services approval; 2) his failure to provide employment verification; 3) an ambiguous text messages on that smart phone that Mr. Webber might be looking to buy property in violation of his bond; and 4) a verbal altercation between Mr. Webber and his new roommate, who indicated that she had terminated Mr. Webber's tenancy due to an argument because "she wanted him out of the house", the magistrate court remanded Mr. Webber to custody at the November 24, 2015 bond hearing. *See* Docket 123; see also Exhibit B, Audio Recording of 11/24/2016 Bail Hearing (filed manually).

Mr. Webber once again moved for release on January 25, 2016; that release was denied on the record. *See* Docket 128. In the months that followed, the parties attempted and got very close to resolving the case for a period of 30 months incarceration.[4] On good faith belief that the case was, in fact, settling, with an understanding of the custody credits that Mr. Webber had already completed, undersigned counsel made no further efforts to release Mr. Webber until settlement negotiations fell apart on June 16, 2016.

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[4] Because a copy of the Proposed Plea Agreement that was then agreed-to by the parties was submitted to the Court by email on May 5, 2016, and change-of-plea hearings were scheduled by the Court on May 21, 2016 and June 21, 2016, references in this document to the Proposed Plea Agreement are not intended to violate the provisions of Rule 11, but are instead addressed for procedural history purposes.

Once it became clear that the Proposed Plea Agreement would not be entered, counsel endeavored to schedule a further detention hearing. Due to periods of unavailability and other conflicts all parties involved, that hearing could not be scheduled until July 8, 2016. Unfortunately, on that date there was a fire in the federal building requiring evacuation, necessitating the rescheduling of the detention hearing to July 27, 2016. On that date, Mr. Webber's request for release to the halfway house was denied, due to a lack on information as to whether or not the halfway house would re-accept Mr. Webber, as well as the magistrate court's dissatisfaction with Mr. Webber's explanation about missing his curfew on November 10, 2015. *See* Docket 144.

Mr. Webber's motion for release from custody was then renewed on September 1, 2016. By that time, Pretrial Services had received information that the halfway house would, in fact, take Mr. Webber back. However, Pretrial Services still recommended detention on the basis that "Mr. Webber cannot be trusted" and due to the long history of violations, such as being late for curfew, possessing a smart phone without permission, and his often aggressive stance with Pretrial Services. The government agreed with Pretrial Services, and also recommended detention.

Although at one point during the hearing, Magistrate Judge Corley appeared inclined to release Mr. Webber back to the halfway house under strict, lockdown conditions that he only leave for the purpose of meetings with counsel to prepare for trial, the Court circled back and changed its mind on that decision once Mr. Webber voiced concerns that he would not be able to leave the halfway house under the proposed conditions to obtain additional clothing to wear. *See* Exhibit C, Audio Recording of 9/1/2016 Bail Hearing (filed manually). This Motion to Revoke Detention Order follows.

Admittedly, and in candor to the Court, Mr. Webber's overall performance on pretrial supervision had its ups and downs. Pretrial Services has found him difficult to deal with, leading Judge Corley to go so far as to potentially consider avenues of release that would *not allow for* Mr. Webber to make any phone calls to Pretrial Services. *See* Exhibit C. But all told, Mr. Webber was on release for nearly a full 10 months under extremely stringent conditions of release, and he never once 1) tested positive for illicit substances; 2) committed a new offense, or 3) engaged in any conduct leading to his arrest, other than his remand in November, 2015. Although he was not able to develop a steady employment history, he did work sporadic jobs, renew his driver's license, settle and pay off his outstanding child support obligations to the State of California, and renew his relationship with his teenage daughter, Maryanne. In sum, though his performance may have been less than exemplary while on release, none of the violations incurred by Mr. Webber support a conclusion that he is either a flight risk or a danger to the community. Because these are the only two grounds upon which the Bail Reform Act allows this Court to detain Mr. Webber, release pending trial is the appropriate and constitutional remedy.

ARGUMENT

Under the terms of the Bail Reform Act, an accused person shall be released pretrial on the "least restrictive" combination of conditions that "will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B); *see also United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985) (Kennedy, J.) (noting that "federal law has traditionally provided that a person arrested for a noncapital offense shall be admitted to bail" and "[o]nly in rare circumstances should release be denied"). A person facing trial generally shall be released if some "condition, or combination of conditions . . . [can] reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c).

Because this case is not a "presumption" case under 18 U.S.C. 3142(e), it is squarely the government's burden to keep Mr. Webber in custody pending trial. A finding that a defendant is a danger to any other person or the community must be supported by "clear and convincing evidence" while the standard for establishing flight risk is preponderance of the evidence. See 18 U.S.C. § 3142(f)(2)(B).

The Bail Reform Act specifies the factors that the court "shall . . . take into account" when deciding whether to set conditions: (1) the nature and circumstances of the offense; (2) the weight of the evidence; (3) the history and characteristics of the person, including the person's character and condition, family, community, and employment ties, financial resources, past conduct, drug and alcohol history, criminal history, prior record of non-appearance, and whether the person was on probation or parole at the time of the offense; and (4) the nature and seriousness of the danger that the person would pose to any person or the community if released. 18 U.S.C. § 3142(g)(1)-(4). Under the Bail Reform Act, the "weight of the evidence" in support of the charge against the defendant "is the least important of the various factors." *Motamedi*, 767 F.2d at 1408. Moreover, "[a]lthough the statute permits the court to consider the nature of the offense and the evidence of guilt, the statute neither requires nor permits a pretrial determination that the person is guilty." *Id*. (citation omitted).

Regarding danger, the conditions imposed must be sufficient to "reasonably assure" the safety of the community, but safety need not be absolutely guaranteed. *See United States v. Orta*, 760 F.2d 887, 889-90, 891-92 (8th Cir. 1985) (en banc) (noting that the Bail Reform Act does not require the magistrate judge to find that conditions of release will "guarantee" the defendant's appearance or the safety of the community). Requiring that release conditions guarantee the community's safety would undermine Congress's clear intent that only a limited number of defendants be subject to pretrial detention. *See Orta*, 750 F.2d at 890 (discussing S.Rep. No. 225, 98th Cong., 1st Sess. 3, reprinted in 1984 U.S.Code Cong. & Ad.News 3182, 3189). Thus, as the Eighth Circuit has stated, courts deciding whether to release a defendant in view of safety concerns cannot demand more than an "objectively reasonable assurance of community safety." *Orta*, 760 F.2d at 892

The Bail Reform Act provides four options for a court considering the pretrial release of a defendant: (1) release on personal recognizance or upon execution of an unsecured appearance bond pursuant to 18 U.S.C. § 3142(b); (2) release on one or more conditions specified in § 3142(c); (3) temporary detention to permit revocation of conditional release, deportation, or exclusion, under § 3142(d); or (4) pretrial detention under § 3142(e). In cases where the court imposes a financial condition, the Bail Reform Act "prohibits pretrial detention on the sole basis of an inability to satisfy a financial condition of release." *Orta*, 760 F.2d at 892 n.22; 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

I. The Nature and Circumstances of the Offense

As set forth above, Mr. Webber is charged with conspiring to commit wire and mail fraud, as well as "aggravated identity theft." The quotations around the latter charge are purposeful, in that this case presents the greatest stretch of "identity theft" that the undersigned has ever seen in federal court. Though the Ninth Circuit may have disagreed with this Court about the legal reach of the aggravated identity theft statute, the facts of this case are undisputed – Mr.Webber's exposure on an aggravated identity theft conviction revolves around the fact that the forms transmitted to Bercovich contained inmate information happened to include Social Security numbers. This is not a case of a nefarious credit card hacker who ruthlessly stole individuals' identities to open credit accounts, invade bank accounts, and ruin credit histories. In the light most favorable to the government, the case against Mr. Webber on aggravated identity theft begins and ends when the inmates fully consented to use their own identifying information to commit tax fraud. Even assuming, *arguendo*, that Mr. Webber came up with the idea for the inmates to claim tax credits to which they were not entitled, the decision to use their own identifying information in the filing of those tax returns was a choice each individual inmate made himself. Whether Mr. Webber can be successfully convicted for "aggravated identity theft" simply because he gave advice, handed out forms, wrote down income amounts on those forms, and arguably mailed forms containing inmates' identifying information – with their full consent – remains to be seen. But for bail purposes, it is clear that the instant case is not even close to the worst case of "aggravated identity theft" that has been prosecuted in this building.

With respect to the fraud charges, Mr. Webber earlier set forth his contention that his role in any alleged conspiracy, even if proved, is extremely small. Because Mr. Webber was in custody for the great proportion of the time that IARLS was engaged in the business of filing tax returns, his role and participation was necessarily limited. Under all constructions of the law and fact of this case – even the government's – Mr. Webber's claimed culpability in this case is far less than co-defendant Bercovich. The 33 month sentence he will have nearly served as of the date of the detention hearing before this Court is more than enough punishment for the role in this offense that the government claims he played, given that he did not have contact with the vast majority of the individuals on the Government' Loss Spreadsheet (Exhibit A) and did little more to further the fraud than the inmates themselves who will be the key government witnesses at trial.

II. The Weight of the Evidence

In the detention analysis, the weight of the evidence is the least important factor, although the Court is allowed to consider it to assess potential danger. *See Hir*, 517 F.3d at 1090; *Motamedi*, 768 F.2d at 1408 (explaining that the statute neither requires nor permits a pretrial determination of guilt). As previously set forth, this is a non-violent offense that harmed no one other than the IRS. Moreover, the heart of Mr. Webber's argument for bail at this juncture is that *even assuming he is convicted, he has already served all the custody time that the case merits*. Under these circumstances, the weight of the evidence should be more appropriately weighed as how much punishment Mr. Webber ultimately would deserve even if convicted. Based on the facts presented herein, which Mr. Webber believes the government has little cause to dispute, Mr. Webber submits that he is less culpable than co-defendant Bercovich in this matter, and already has served a lengthy federal prison sentence while he was supposed to enjoy the presumption of innocence. The weight of the evidence, even assuming the facts most favorably to the government, suggest that additional pretrial detention for Mr. Webber would violate his Eight Amendment rights.

III. The History and Characteristics of Mr. Webber

In considering Mr. Webber's history and characteristics, the Court is directed to consider his character and condition, family, community, and employment ties, financial resources, past conduct, drug and alcohol history, criminal history, prior record of non-appearance, and whether he was on probation or parole at the time of the offense.

A. Family and Community Ties

Mr. Webber has lived in Northern California since 2000. While on release, he resided with his family in Marin County and has engaged in close relationships with his family members, including his ex-girlfriend Mayra Parl, who supported him both by signing on his bond and offering Mr. Webber a place to live. While on release, Mr. Webber re-engaged his ties with his sixteen year old daughter, Maryanne. Mr. Webber also has an autistic son, Howard, who lives with his mother, Jessica Zeigler, in Marin County.

Most importantly, at all times during his 10 month period of release on this case, Mr. Webber maintained residence in either San Francisco or Marin County, and did not flee. These factors all weigh heavily in favor of pretrial release and a finding by this Court that Mr. Webber is not a flight risk.

B. History of Drug Use and Probation/Parole Status

Although Mr. Webber does have a prior conviction for a drug crime, from approximately 1991, he has no additional drug abuse or drug use history. Moreover, Mr. Webber has not tested positive for any illicit drug use while he was on pretrial release in this case. Mr. Webber thus believes it is undisputed that he does not have a drug abuse problem. Nor is he any longer on parole with the State of Wisconsin. This factor also weighs in favor of a finding that Mr. Webber is neither a flight risk nor a danger to the community.

C. Criminal History and Prior Record of Nonappearance

Finally, in the past the government has heavily relied on Mr. Webber's criminal history to support its argument that he should be detained. This is due to the fact that in 2012, a state court judge in Wisconsin adjudicated a parole and custody dispute on Mr. Webber's 1991 drug case. As found by Judge Kieffer, Mr. Webber was initially sentenced in 1991 to six years of probation, with a six year suspended sentence. In 1997, the Wisconsin DOC commenced revocation proceedings, which Mr. Webber attended out of custody. In 1998, he failed to appear for the conclusion of the revocation hearing, which ended with his revocation and the imposition of a prison sentence. Mr. Webber appealed the revocation order, which was denied. Although contested by Mr. Webber, Judge Kieffer ultimately found that Mr. Webber "was aware of the revocation order, the appeal being denied, and the fact that probation had been revoked. Mr. Webber went to Panama while aware of the sentence he was required to serve." *See* Exhibit D, Decision and Order.

Over the next 13 years, from 1998 to 2011, Mr. Webber made multiple inquiries of the status of the Wisconsin warrant. *Id.* at ¶ 5. Despite his being arrested at times between 2000 and 2011 in various states, there was no indication that Wisconsin intended to extradite him to execute the sentence. *Id.* This all changed on February 1, 2011, when for unknown reasons the Wisconsin DOC changed positions and "corrected its error" to choose to extradite Mr. Webber – after 13 years of assuring him that the case was non-extraditable. This was all unbeknownst to Mr. Webber, who had called the Wisconsin DOC many times from custody inquiring as to whether or not he could be extradited on the warrant in order to serve concurrent time, or at least, take care of the matter.

Instead, Mr. Webber was shocked to discover that Wisconsin had changed its tune and opted to extradite him when he was pulled over in Gilroy, California on a traffic violation. This arrest then led to a 27 month ordeal with the Wisconsin Department of Corrections whereby Mr. Webber attempted, through counsel, to adjudicate the inequity of the situation involving the stale warrant and his untold attempts to have the warrant resolved while he was in California. All told, including the Wisconsin case, Mr. Webber has now been in nearly continuous custody from July, 2011 through today – excepting the 10 month period of time that he was released to the halfway house and on electronic monitoring.

Mr. Webber of course does not dispute that he has prior convictions and parole/probation violations, and he does not dispute that a state court judge made a 2012 finding that he knew about an outstanding sentence and instead opted to move to Panama. It is important to remember, however, that assuming that Judge Keiffer's conclusions are correct, this decision to leave the country occurred in 1998 – **which is nearly 20 years ago**. In countless bail hearings before Magistrate Judge Corley, the government has repeatedly overstated its seriousness of this decision and has ignored the significant passage of time since the alleged "flight to Panama." Rather than accept the government's arguments, however, Judge Corley has justly and fairly considered Mr. Webber's more recent conduct while on release, including the fact that he made all his court appearances while out of custody and even showed up on November 24, 20165 to Judge Corley's scheduled appearance knowing there was a strong chance that Judge Corley would remand him into custody that day. As Judge Corley has repeatedly stated, Mr. Webber has shown himself to not be a flight risk by the fact that he did not flee during the ten month period of his pretrial release. Moreover, as Judge Corley indicated at Mr. Webber's last detention hearing, Mr. Webber's current plan to go to trial, as well as the very significant period of custody time he has already completed were he to lose the trial, weighs in favor of a judicial finding that Mr. Webber is even less of a flight risk now than he was at the time the Court opted to release him from custody in January, 2015. In other words, he has already done so much time on this case, that it is unlikely that he would be asked to serve much more, even if convicted. It is thus his more recent conduct appearing for Court as ordered – even to be remanded – that is a better indication of his likelihood of compliance with future court dates.

Other than the Panama situation, Mr. Webber's only two criminal convictions in the last 15 years are two CPC 422s (terrorist threats convictions) related to domestic partners in 2006 and 2009. Since his release from custody in January, 2015, however, neither Pretrial Services nor Marin County authorities have heard of any trouble from either woman (in either case) related to Mr. Webber. Neither the Court nor the government received any reports of Mr. Webber somehow tampering with the government's witnesses or its case, or otherwise obstructing justice. During the 10 months of his release, Mr. Webber has posed a threat to no one. He has no prior convictions nor arrests for possessing weapons or firearms, and has never been accused of physically harming anyone, including in the context of his 2006 and 2009 threats cases. All told, Mr. Webber is not a physical danger to the community, a finding that was emphasized by Judge Corley at the September 1, 2016 detention hearing. *See* Exhibit C.

IV. Mr. Webber is Not an Economic Danger

When asked the basis for Mr. Webber's ongoing detention on September 1, 2016, Judge Corley did make reference to the fact that she had concluded that Mr. Webber posed "an economic danger." Because there is simply no evidence that Mr. Webber is an economic danger, much less "clear and convincing" evidence, this Court should find that Judge Corley's conclusions detaining Mr. Webber on this basis were erroneous.

Although a finding of danger "may, at least in some cases, encompass pecuniary or economic harm" (*see United States v. Reynolds*, 956 F.2d 192, 193 (9th Cir. 1992)) the allegations in this case simply do not rise to the level that is contemplated by the Bail Reform

Act. *See United States v. Madoff*, 826 F.Supp.2d 699, 700 (S.D.N.Y, 2011)(noting that Madoff's fraud scheme cost his clients billions of dollars, yet allowing for pretrial release on conditions); *United States v. Giordano*, 370 F. Supp. 2d 1256, 1264 (S.D. Fla. 2005)(denying government's detention motion even when defendant was charged with 35 counts of fraud offenses and explaining that "in economic fraud cases, it is particularly important that the government proffer more than the fact of a serious economic crime that generates great sums of ill-gotten gains . . .evidence of strong foreign family or business ties is necessary to detail a defendant even in the face of a high monetary bond.")

As previously argued, the loss purportedly caused directly by Mr. Webber in this case (again, assuming the facts most favorably to the government) is a relatively small – substantially less than $50,000. Indeed, this is not a Bernard Madoff type case, even considering Bercovich's alleged conduct. In order to succeed on an argument that a defendant poses a danger to the community in economic terms, at least one judge of this Court has concluded that the government must show "that fraudulent activity is ongoing or that the defendant has a propensity to continue fraudulent activity." *See United States v. Cohen*, 2010 U.S. Dist. LEXIS 138508, at *23 (N.D. Cal. 2010). In that case, the defendant was alleged to have passed money through multiple foreign bank accounts, to the tune of millions of dollars, and committed significant fraud.

Here, the government claims that Mr. Webber is an "economic danger" points to a couple of emails attached to the Twitchell declaration (Docket 98-1)(which the government itself admits are "rambling") where Mr. Webber took a legitimate letter of intent from a financer and appears to have attempted to act as a middleman in a property sale. Whether reality or fantasy on Mr. Webber's part, it is undisputed that Mr. Webber neither obtained funds directly, nor endeavored to do so, in this course of conduct. Whomever Mr. Webber believes himself to be in the real estate world, he is simply not a realistic "economic danger", nor a threat to others. This is not a legitimate basis upon which the Court can detain Mr. Webber.

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V. The Due Process Clause and the Eighth Amendment Also Weigh in Favor of Mr. Webber's Release

In this unusual case, an additional factor that this Court must consider along with the Bail Reform Act is the Due Process Clause and the Eighth Amendment's prohibition against undue or excessive punishment for the crime charged. As previously stated, Mr. Webber has been released by Magistrate Judge Corley multiples times, but was last remanded on November 24, 2015. He has now served nearly the equivalent of a 33 month sentence (as of September 29, 2016) in custody, for a much lesser charge of fraud than many defendants who appear before this Court having stolen or defrauded individuals of much greater sums of money than the sum at issue here.

Although the Ninth Circuit has no proscribed rules that allow a district court to determine when a length of pretrial detention raise a constitutional issue, it has acknowledged that there is a point where enough is enough. *See United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988)(citing circuit caselaw and further finding that "we find that the due process limit on the length of pretrial detention requires assessment on a case-by-case basis.") That case-by-case analysis here weighs heavily in favor of release, as Mr. Webber has served enough time to both encompass the mandatory minimum sentence called for by a potential §1028A convictions, as well as a near Guideline sentence for fraud in the amount of $15,000-$40,000 (which at CHC III, would suggest a Guideline range at 12-18 months). Given the frequency, however, with which federal courts in this District depart from Guideline sentences, as well as the specious nature of the government's contentions that this case is an appropriate one for an aggravated identity theft charge, undersigned counsel for Mr. Webber now has great concern that additional custody time served by Mr. Webber will negate any and all potential sentencing arguments she could make in the future for a sentencing variance. This would not only be unfair to Mr. Webber, but would be an unduly unjust result in this case.

The aforementioned is particularly true given the fact that the government has only recently augmented its discovery production to include thousands of additional pages of substantive discovery – including hundreds of additional bank records that relate to co-defendant Bercovich, additional reports of witness interviews, and 1700 pages of tax returns that relate to the government's argument that the scope of the conspiracy is much broader than the substantive counts charged. As articulated by defendant Bercovich in his Motion to Continue the Trial Date (see Docket 157), this new discovery is integral to the trial and will take significant time to review and absorb prior to the current trial date of November 7, 2016.

Ordinarily, in a white collar case with an out-of-custody co-defendant, the undersigned would have wholeheartedly agreed with co-defendant counsel and jointly moved for a continuance to ensure that Mr. Webber is defended as vigorously as possible. In reality, undersigned counsel needs as much time to review the new discovery as Mr. Swanson, but now finds herself in the untenable position of trying to decide between 1) guaranteeing her client's right to outstanding representation by counsel who is thoroughly prepared and well versed in all the government's evidence, versus 2) prolonging his detention to a point beyond necessity, whereby that outstanding representation is compromised by a desire to get this case completed quickly one way or another, so if things go wrong the sentencing is not delayed.

This Court should not allow this dilemma to continue given the fact that Mr. Webber has proven, through ten months of release, that he is neither a flight risk nor a danger to community. If released on the conditions set forth above, he will appear for trial, on time, every day, and will undoubtedly submit to service of any additional time this Court may impose should he be convicted. Moreover, between now and trial Mr. Webber will prove himself to be a danger to no one.

CONCLUSION

No matter what ultimately happens in connection with this case, Mr. Webber cannot be held in custody indefinitely. And at this stage in the proceedings, he is presumed innocent of the charges. Even if convicted, he will soon be under the supervision of the U.S. Probation Department, which will not include such stringent conditions as a halfway house or electronic monitoring. Although Mr. Webber has not always performed well while on pretrial release, he is not likely to be any trouble to the Court if he is released under less restrictive conditions. There is no evidence that he is a flight risk or a danger to the community. Quite the opposition – Mr. Webber has always shown up for Court when asked (on time no less) and even showed up in November, 2015 to be voluntarily remanded. There is no evidence that he poses an economic danger to others. Accordingly, there is no basis to hold him in pretrial custody under the Bail Reform Act.

Moreover, this case has now reached the point where Mr. Webber's ongoing incarceration presents a due process and Eighth Amendment problem. Quite simply, even if convicted in this case, he has an excellent argument that the time he has already served is more than adequate punishment for the crimes charged. This, coupled with the vast difficulty that Mr. Webber will face preparing for trial in a complex and document-intensive case, merits his immediate release from custody with a requirement that he report to Pretrial Services as directed, establish a stable residence, and obtain verifiable employment. This case is, at its heart, a tax case, and Mr. Webber should be allowed out of custody on similar reporting conditions that other white collar defendants are afforded routinely before this Court – maintain employment and residential ties, report to Pretrial Services as directed, and release on an unsecured bond.

For the reasons stated above, defendant Howard Webber respectfully requests that the Court revoke Judge Corley's order of detention and order him released on a $100,000 unsecured bond.

Respectfully submitted,

STEVEN G. KALAR
Federal Public Defender

Dated: September 16, 2016

/s/ Elizabeth Falk

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Assistant Federal Public Defender